

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE POLLUTION CONTROL AGENCY

In the Matter of the
Administrative Penalty Order
Issued to OSI Environmental, Inc.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on October 21, 2003, at the Office of Administrative Hearings in Minneapolis, Minnesota. The OAH record closed when the last post-hearing brief was received on December 17, 2003.

Leon R. Erstad, Attorney at Law, Erstad & Riemer, P.A., 200 Riverview Office Tower, 8009 – 34th Avenue South, Minneapolis, MN 55425, appeared on behalf of OSI Environmental, Inc. ("OSI"). Carmen Chittick Dierking, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least five days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

The issue presented in this case is whether OSI violated Minn. Rules part 7045.0371 when it transported hazardous waste to South Bend, Indiana, using a hazardous waste manifest that failed to list a U.S. Environmental Protection Agency identification number and, if so, whether the Administrative Penalty Order issued by the MPCA on June 7, 2002, should be affirmed.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. This matter arises out of the transportation and disposal of hazardous waste materials located at a Cy-Con Construction, Inc. (hereafter "Cy-Con") site at 600 Toppings Street, St. Paul, Minnesota by OSI Environmental, Inc. ("OSI") to a waste disposal facility in Indiana.^[1]

2. OSI first began operations in 1988 and was primarily engaged in the handling of used oil. It has expanded its operations since that time and has locations in Merrillville, Indiana; Milwaukee and Green Bay, Wisconsin; and Bemidji, Moorhead, and Rogers, Minnesota.^[2]

3. Shipments of hazardous waste in Minnesota require the use of a federal document called a hazardous waste manifest. The shipper fills out the manifest, and the manifest accompanies the waste. When others take custody of the hazardous waste, they must sign and date the manifest. The information contained in the manifest is used to electronically track waste from "cradle to grave." This process enables hazardous waste to be managed and overseen by a small staff of people.^[3]

4. Shon Schulte, an employee of OSI, handled this matter on behalf of OSI. On April 17, 2000, Mr. Schulte visited the Cy-Con construction site. On the same day, he sent letters to Conworth, Inc., and Cy-Con setting forth OSI's disposal pricing bid estimate.^[4]

5. On April 21, 2000, Conworth, Inc., working as a relocation consultant for the St. Paul Port Authority, sent a letter to Cy-Con instructing Cy-Con to contact OSI for purposes of removal of the hazardous waste. A copy of this letter was not sent to OSI.^[5] Cy-Con contacted Mr. Schulte by telephone and told him that OSI had been selected as the transporter of the materials.^[6]

6. The materials were being shipped to Millennium Environmental, Inc. of Indiana ("MEI-IN"). Mr. Schulte asked Chuck Young of Cy-Con to give him Cy-Con's U.S. EPA identification number for use on the Indiana Hazardous Waste Manifest that was being prepared for the hazardous waste portion of the shipment. Mr. Young told Mr. Schulte that Cy-Con did not have an EPA ID number and that they needed the waste removed quickly, and asked Mr. Schulte to see if there were other options that could be available.^[7]

7. OSI thereafter contacted MEI-IN regarding whether the waste could be transported to the Indiana facility without an EPA ID number. MEI-IN suggested the

possibility of a Conditionally Exempt Small Quantity Generator (“CESQG”) exemption and requested that Cy-Con complete the CESQG certification prior to shipment.^[8]

8. OSI never contacted the MPCA or the Indiana Department of Environmental Management regarding the manifest or whether a CESQG exemption was applicable to the transportation of this hazardous waste.^[9]

9. On May 1, 2000, Cy-Con signed a Conditionally Exempt Small Quantity Generator (“CESQG”) certification.^[10] This was done at the request of OSI.^[11]

10. OSI provided to Cy-Con an Indiana Uniform Hazardous Waste Manifest authorizing transport of the hazardous material to MEI-IN. On May 25, 2000, Cy-Con signed the Indiana Uniform Hazardous Waste Manifest, Indiana Manifest No. 1377261, on which “Section 1: Generator’s U.S. EPA ID Number” was marked “Not Applicable.”^[12]

11. OSI transported the hazardous wastes to Indiana without incident, and the hazardous waste facility, MEI Indiana, accepted the shipment without response or objection.^[13]

12. On November 20, 2000, the Indiana Department of Environmental Management sent a letter to Paula O’Keefe of the MPCA. In the letter, the Indiana Department of Environmental Management informed Ms. O’Keefe that Cycon Construction, 600 Topping St., St. Paul, had shipped hazardous waste in quantities over the conditionally exempt small quantity generator storage limit under Manifest Document No. INA1377261 and had no EPA ID number. The matter was referred to the MPCA for investigation.^[14]

13. Minnesota rules identify those who produce 100 kilograms (220 pounds) or less of hazardous waste in a calendar month as Very Small Quantity Generators (“VSQG”); those who produce more than 100 kilograms (220 pounds) but less than 1,000 kilograms (2,200 pounds) of hazardous waste in a calendar month as Small Quantity Generators (“SQG”); and those who produce 1,000 kilograms (2,200 pounds) or more of hazardous waste in a calendar month as Large Quantity Generators (“LQG”). Minnesota regulates VSQGs as well as generators of larger sizes, and does not recognize a CESQG exemption. Thus, the Minnesota rules vary from the federal rules because the federal rules call a VSQG a “CESQG” and exempt them from compliance.^[15]

14. The manifest involved in the present case gave the number of gallons of particular items that were shipped, and did not specify the total weight of the shipment. Based upon the manifest and MPCA research regarding the specific gravity of the items mentioned, it is evident that at least 1,174 to 1,425 pounds were transported by OSI in this shipment. This total is reached by adding the weights of mineral spirits (255 gallons shipped, with a specific gravity of .78 or 6.516 pounds per gallon, for a total of 715 pounds), and hazardous waste asphalt water emulsion (55 or 85 gallons shipped, with a specific gravity of 1 or 8.35 pounds per gallon, for a total of 459 or 710 pounds).^[16] The manifest also indicated that 165 gallons of “epoxies and adhesives” and 5 gallons of “waste aerosols” were shipped. Because the manifest did not state with specificity the types of epoxies and adhesives that were shipped and there are thousands of different

types, and because it did not indicate whether the aerosols were shipped in metal cans or, if so, how full such cans were, it was not possible for the MPCA to determine the weight of those items with precision. It is likely, however, that epoxy adhesives are a little lighter than water, which has a specific gravity of 1 and weighs 8.35 pounds per gallon. Although waste aerosol is usually much lighter than water, it is often shipped in metal cans which would add weight to the load. In any event, a shipment of 1,174 to 1,425 pounds would not fall within CESQG status under federal law or within VSQG status under Minnesota law. It instead would fall in the middle of the range encompassed within SQG status.^[17]

15. After receiving the referral from Indiana, the MPCA made inquiries of Ramsey County and Cy-Con and conducted an investigation, then convened an informal meeting of MPCA senior staff and supervisors called a “forum” to discuss whether enforcement action should be taken in this matter. Such forums are held to ensure that a variety of MPCA staff members have considered the facts before an enforcement decision is made and that the agency is acting in a consistent manner. Sometimes representatives of other State agencies are also invited to participate in a forum. In this case, MPCA personnel ultimately agreed that “ten day letters” should be issued to Cy-Con and OSI. A ten-day letter is one in which the MPCA alleges that a violation occurred, briefly describes the problem, and asks for a response within ten days. The MPCA did not send MEI-Indiana a ten-day letter because it is outside the MPCA’s jurisdiction.^[18]

16. On March 28, 2001, the MPCA issued a ten day letter to Cy-Con alleging that Cy-Con generated and shipped hazardous waste off-site without obtaining a U.S. EPA ID number.^[19]

17. On March 28, 2001, the MPCA also issued a ten-day letter to OSI alleging that OSI transported seven drums containing approximately 265 gallons of hazardous waste to MEI-IN in South Bend, Indiana, with a hazardous waste manifest that did not contain the generator’s U.S. EPA ID number.^[20]

18. After receiving the ten-day letter, Cy-Con called Joseph Henderson, a Pollution Control Specialist Compliance Coordinator, to discuss the situation and ask why the letter had been sent. Cy-Con indicated that it was not very familiar with the hazardous waste rules and had relied upon OSI to follow the correct procedures.^[21]

19. On April 4, 2001, Cy-Con responded in writing to the MPCA’s March 28, 2001, letter. In its response, Cy-Con indicated that the St. Paul Port Authority took over Cy-Con’s construction yard in the spring of 2000 and requested that Cy-Con obtain two bids on removing materials from its yard. According to Cy-Con, the materials to be moved were construction adhesives and petroleum products. Cy-Con further indicated that it was instructed by the Port Authority to contract with OSI to dispose of these materials and was told that OSI would handle all registration and paperwork that was necessary to dispose of the materials. Cy-Con indicated that, at OSI’s request, it signed a small generator certificate and a Uniform Hazardous Waste Manifest, which had been prepared by OSI. Cy-Con said that OSI informed it that everything was in order and the materials were shipped by OSI to the Indiana facility. Cy-Con denied committing any violations.^[22]

20. On April 6, 2001, OSI responded to the MPCA's March 28, 2001, letter. In its response, OSI indicated that Federal and Indiana regulations did not require a CESQG to obtain an ID number, and questioned whether the requirements relating to Minnesota manifests properly applied in this instance. OSI requested specific references to Minnesota, Indiana, and Federal regulations that establish the connection between Minnesota's Very Small Quantity Generator rules, the application of a generator's U.S. EPA ID number on an Indiana manifest, and the transporter's responsibilities, and asserted that the regulations cited by the MPCA merely implied this connection but did not establish it. ^[23]

21. After receiving the April 4, 2001, letter from Cy-Con, Mr. Henderson spoke to Chuck Young of Cy-Con on approximately three more occasions. Mr. Young told Mr. Henderson that he believed that the citation was improper. He asked what he needed to do to rectify the situation. Mr. Henderson told Mr. Young that he needed documentation with an EPA identification number. ^[24]

22. On June 12, 2001, Cy-Con applied to the MPCA to obtain a generator's U.S. EPA ID number. On June 19, 2001, Cy-Con issued a corrected Uniform Hazardous Waste Manifest listing a U.S. EPA ID number of MNP 20000485. Cy-Con sent the corrected manifest to the MPCA, OSI, and MEI-IN, the Indiana facility that accepted the hazardous waste materials. ^[25]

23. The MPCA met in another forum after receiving the responses of Cy-Con and OSI to the ten-day letters. James Fox, a Transportation Program Specialist with the Minnesota Department of Transportation's Office of Freight and Commercial Vehicles, participated in that discussion as well as in a later MPCA forum concerning this incident and a meeting with OSI. The issues were discussed and a consensus was reached regarding the action to be taken. It was decided that the MPCA would issue an Administrative Penalty Order ("APO") to OSI alleging violations of Minnesota Rules. Mr. Henderson drafted an APO calculation worksheet in connection with the issuance of the APO. The MPCA met in another forum after the worksheet was drafted, and issued an APO to OSI on August 28, 2001. ^[26]

24. OSI filed an appeal of the August 28, 2001, APO on September 8, 2001. ^[27]

25. After an appeal of an APO is filed, it is customary for the MPCA to meet with the appealing party to discuss the circumstances before the hearing is held. In accordance with this policy, the MPCA contacted OSI after it appealed the August 2001 APO and asked for a meeting. ^[28]

26. In March of 2002, the MPCA met with OSI regarding the August 2001 APO. Mr. Henderson told OSI during the meeting that he believed that the quantities shipped on the manifest in question far exceeded the CESQG limits. ^[29]

27. After the March 2002 meeting with OSI, the MPCA convened another forum to reconsider the original violation cited. ^[30]

28. On June 7, 2002, the MPCA rescinded the August 2001 Administrative Penalty Order to OSI and issued a new APO which is the only APO at issue in the current proceeding. The June 2002 APO alleged a violation of "Minn. R. 7045.0375, [TRANSPORTATION OF HAZARDOUS WASTE] which references 49 C.F.R.

§ 172.205(a) [HAZARDOUS WASTE MANIFEST] which states no person may offer, transport, or deliver a hazardous waste unless a hazardous waste manifest is prepared in accordance with 40 C.F.R. § 262.20, which requires compliance with 262, Appendix . . .” The APO further indicated that the Appendix, in turn, specifies that “Federal regulations also require generators and transporters of hazardous waste and owners or operators of hazardous waste treatment, storage and disposal facilities to complete the following information Item 1. Generator’s U.S. EPA ID Number—Manifest Document Number. Enter the generator’s U.S. EPA twelve digit identification number”^[31]

29. The MPCA alleged in the administrative penalty order that OSI accepted seven drums, which contained 365 gallons total, of hazardous waste from Cy-Con for transportation to MEI-IN in South Bend, Indiana, on a manifest that was not completed in accordance with manifest instructions or the Appendix to Code of Federal Regulations, title 40, part 262. The APO noted that the requested corrective action (distribution of a corrected hazardous waste manifest for the shipment) had been completed. A nonforgivable penalty of \$1,000 was imposed. OSI was informed of its right to seek review of the order in an expedited hearing before an Administrative Law Judge or before a District Court Judge.^[32]

30. The MPCA completed a Penalty Calculation Worksheet with respect to the June 2002 APO to determine the appropriate penalty amount to assess OSI. The MPCA’s Penalty Calculation Worksheet follows the factors to be considered under Minn. Stat. § 116.072 and provides guidance for determining the appropriate penalty amount. In calculating the base penalty, the MPCA sets forth current and previous violations by the entity; determines if the violation is serious; determines if the violation is repeated; decides whether the potential for harm to humans, animals, air, water, land, or other natural resources was minor, moderate or severe (vertical axis of the matrix, labeled “Potential for Harm”), and then decides whether the deviation from compliance was minor, moderate, or severe (horizontal axis of the matrix, labeled “Deviation from Compliance”). The base penalty may be adjusted (enhanced or mitigated) due to willfulness or culpability, history of past violations, economic benefit gained from the violation, and other factors as justice may require.^[33]

31. The MPCA matrix for calculating the base penalty is shown below:^[34]

		Deviation from Compliance		
		Minor	Moderate	Major
Potential For Harm	Major	\$5,000 to \$2,000	\$8,000 to \$3,500	\$10,000 to \$5,000
	Moderate	\$2,000 to \$500	\$3,500 to \$1,000	\$5,000 to \$2,000
	Minor	\$500 to \$0	\$1,000 to \$200	\$2,000 to \$500
		Base Penalty Range		

32. The MPCA Worksheet listed six rule violations that allegedly were committed by OSI in 1994 and 2000 involving Minn. R. 7001.0030 (no permit), 7045.0371 (no hazardous waste transportation license), 7045.0375 (accepting without a manifest), 7001.0520 (no permit), and 7045.0261 (manifest required). The Worksheet indicated that the violation by OSI in this instance was repeat in nature because OSI had been cited more than once for not using a manifest while transporting hazardous waste for other generators.^[35]

33. Based on a “minor” potential for harm and a “major” deviation from compliance, the MPCA concluded that the base penalty for OSI’s violation should be \$500. The potential for harm was seen as minor because the driver was well trained in hazardous waste emergency response, OSI is a licensed hazardous waste transporter, and OSI is insured to meet all DOT requirements. The deviation was viewed as major because OSI picked up and transported the waste knowing the manifest did not contain an EPA identification number and knowing that the generator did not have an EPA identification number. The low end of the range was selected because OSI indicated that the facility had suggested the use of a CESQG exemption which can be used in some states but not Minnesota and OSI went along with the facility suggestion. The base penalty was enhanced by \$200 for willfulness/culpability based on the MPCA’s view that OSI helped prepare the manifest and, as a consultant and hazardous waste transporter, should have known the requirements for shipping. The base penalty was enhanced by an additional \$300 because this was the third time that the MPCA had cited OSI for improper manifesting (prior violations in 1994 and 2000) and the prior violations were deemed to be “quite similar” to the current violation. The Worksheet noted that a 1994 Stipulation with OSI found violations for transporting hazardous waste from gas stations back to their facility without a manifest or hazardous waste transporter license, and that a prior APO issued in 2000 included violations for not manifesting hazardous waste back to their facility where it was improperly treated. The MPCA found that OSI had not received any economic benefit due to the violation. The MPCA

decided that the penalty should be non-forgivable because the violation was serious and repeated in nature. The MPCA noted in the worksheet that it views proper manifesting of hazardous waste to be very important since it is the only way in which hazardous waste can be traced from “cradle to grave.” It indicated that Minnesota requires a federal EPA/DOT document “for all nonexempt shipments of HW [hazardous waste] (LQG, SQG, and VSQG).” It also noted that the lack of an EPA identification number makes it impossible for the MPCA or other states to access information on the generator. The total penalty ordered by the MPCA, with enhancements, thus was \$1,000.^[36]

34. By letter dated July 1, 2002, OSI appealed the APO and requested an expedited hearing before an Administrative Law Judge. OSI contested the violation, the penalty, and the conclusion of the MPCA that the penalty was nonforgivable. It asserted that it did not violate Minn. R. 7045.0375 or 49 C.F.R. 172.205(a), and that it complied with applicable Indiana and federal regulations and acted only after consulting with appropriate authorities in the state where the materials were being sent.^[37]

35. On March 19, 2003, the MPCA issued a Notice of and Order for Hearing regarding this matter.^[38]

36. The hearing originally scheduled for April 29, 2003, was continued for a lengthy period of time at the request of both parties to provide them an opportunity to engage in settlement discussions relating to the present case and other matters..^[39]

37. Pursuant to Minn. Stat. § 116.072, subd. 6, the parties agreed through counsel to waive the right to a hearing within thirty days after the filing of the request for hearing.^[40]

38. The MPCA clarified during a prehearing conference on October 7, 2003, and by letter dated October 7, 2003, that a typographical error was made in the June 2002 APO and that the rule that was intended to be cited was Minn. R. 7045.0371, not Minn. R. 7045.0375. The only error in the APO was the number of the rule; the title of the rule and the substance of its provisions were stated accurately in the APO.^[41]

39. Since becoming aware of the MPCA’s views in this matter in March 2001, OSI has adopted a policy that all hazardous waste shipped in Minnesota must have an EPA identification number.^[42]

40. The State of Indiana has not issued any citation to OSI stemming from the May 2000 manifest.^[43]

41. The MPCA has not, to date, issued an APO to Cy-Con. The Cy-Con enforcement file does, however, remain open.^[44]

42. Any Conclusion of Law more appropriate considered a Finding of Fact is hereby adopted as such.

Based on the above Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14.57 – 14.62 and Minn. Stat. § 116.072.

2. The Notice of and Order for Hearing in this matter was proper, and all relevant substantive and procedural requirements of law or rule have been fulfilled. The matter is properly before the Administrative Law Judge.

3. The Minnesota Pollution Control Agency has the burden to establish by a preponderance of the evidence that OSI violated applicable laws or rules and that issuance of the Administrative Penalty Order was warranted. If the violations are established, the Administrative Law Judge may not recommend a penalty different in amount than that contained in the Administrative Penalty Order unless the amount of the proposed penalty is determined to be unreasonable.^[45]

4. Minn. Stat. § 221.033, subd. 1, specifies that, apart from certain exemptions for farmers and persons engaged in intrastate commerce involving gasoline cargo tanks, fertilizer, and agricultural chemicals, “no person may transport or offer or accept for transportation within the state of Minnesota a hazardous material, hazardous substance, or hazardous waste except in compliance with United States Code, title 49, sections 1801 to 1811 and the provisions of Code of Federal Regulations, title 49, parts 171 to 199. Those provisions apply to transportation in intrastate commerce to the same extent they apply to transportation in interstate commerce.”

5. Minn. R. 7045.0371 specifies that “[h]azardous waste shall be transported in accordance with all applicable requirements of Minnesota Statutes, section 221.033 and 221.034, and with 221.035 if applicable, and Code of Federal Regulations, title 49, parts 171 to 179, as amended.”

6. 49 C.F.R. § 172.205(a) states that “[n]o person may offer, transport, transfer, or deliver a hazardous waste (waste) unless an EPA Form 8700-22 and 8700-22A (when necessary) hazardous waste manifest (manifest) is prepared in accordance with 40 CFR 262.20 and is signed, carried, and given as required of that person by this section.” 40 C.F.R. § 262.20(a) states that “[a] generator who transports, or offers for transportation, hazardous waste for offsite treatment, storage, or disposal must prepare a Manifest OMB control number 2050-0039 on EPA form 8700-22, and, if necessary, EPA form 8700-22A, according to the instructions included in the Appendix to part 262.” The Appendix to Part 262 sets out a Uniform Hazardous Waste Manifest form (EPA Form 8700-22) as well as a Continuation Sheet (EPA Form 8700-22A). Item 1 on the EPA Form 8700-22 Manifest contains a blank where the Generator’s U.S. EPA ID Number must be completed prior to transportation of the hazardous waste. The instructions in the Appendix direct the generator to “[e]nter the generator’s U.S. EPA twelve digit identification number and the unique five digit number assigned to this Manifest (e.g., 00001) by the generator” into the blank for item 1 on Form 8700-22.

7. 40 C.F.R. § 261.5 states in pertinent part that “a conditionally exempt small quantity generator’s hazardous wastes are not subject to regulation under Parts 262 through 266” However, Minnesota hazardous waste laws and rules do not incorporate 40 C.F.R. Part 261, nor do they recognize an exemption to EPA identification number requirement for entities that have CESQG status.

8. Minn. R. 7045.0261, subp. 1(C), states that, “[f]or shipments from Minnesota to a facility located in a state (consignment state) that requires the use of a manifest which is specific for that state, the generator shall use that manifest.”

9. Minn. R. 7045.0070 states that “[n]othing in this chapter shall relieve any person from any obligations or duties imposed by any other laws, statutes, rules, standards, or ordinances of the federal, state, or local governments or any agency thereof now in effect or which become effective in the future, including county ordinances In the event this chapter conflicts with any such laws, statutes, rules, standards, or ordinances, the more stringent shall apply. Nothing in this chapter shall be construed to require any person to comply with any portion of this chapter if that portion should at any time be preempted by federal law.”

10. The Commissioner has the authority to assess penalties of up to \$10,000 for violations of MPCA regulations. Pursuant to Minn. Stat. § 116.072, subd. 2(b), the Commissioner may consider the following factors in determining the amount of the penalty:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner . . . specifically identifies the additional factors in the commissioner’s . . . order.

For a violation after an initial violation, the Commissioner is required under Minn. Stat. § 116.072, subd. 2(c) to also consider the “similarity of the most recent previous violation and the violation to be penalized;” the “time elapsed since the last violation;” the “number of previous violations;” and the “response of the person to the most recent previous violation identified.”

11. Under Minn. Stat. § 116.072, subd. 3, an Administrative Penalty Order must include “a concise statement of the facts alleged to constitute a violation” and “a reference to the section of the statute, rule, ordinance, variance, order, stipulation agreement, or term or condition of a permit or license that has been violated.” The MPCA provided adequate notice under this provision.

12. For a repeated or serious violation, the Commissioner may issue a order with a penalty that will not be forgiven after the corrective action is taken, in accordance with Minn. Stat. § 116.072, subd. 5(b). Because OSI’s violation was serious, a nonforgivable penalty is reasonable.

13. The \$500 base penalty assessed by the MPCA against OSI is at the low end of the "Major Deviation from Compliance/Minor Potential for Harm" category of the matrix and is reasonable.

14. Based upon a consideration of all of the statutory factors, and for the reasons discussed in the Memorandum, the MPCA's enhancement adjustments to the base penalty are not reasonable or appropriate.

15. Any Finding of Fact more properly termed a Conclusion is adopted as such. Any Conclusion more properly termed a Finding of Fact is adopted as such.

16. These Conclusions are reached for the reasons discussed in the following Memorandum, which is hereby incorporated into these Conclusions.

Based upon the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner AFFIRM the Administrative Penalty Order issued on June 7, 2002, to OSI Environmental, Inc., but reduce the penalty to \$500.00.

Dated: January 23, 2004.

/s/ Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

Reported: Tape-recorded (2 tapes); Not Transcribed

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

As a threshold matter, OSI alleges that the MPCA failed to provide OSI with specific notice of what regulations it claimed were violated. In this regard, OSI points out that the MPCA has changed its view of which Minnesota rule it violated three times by first alleging a violation of Minn. R. 7045.0261, subp. 7; then Minn. R. 7045.0375; and now Minn. R. 7045.0371. OSI contends that the MPCA did not provide clear and specific notice of the regulations which it alleges were violated due to its changing theories about which particular rule was violated. OSI contends, as a result, that the penalty against OSI should be rejected.

The June 2002 APO is the only APO that is at issue in this proceeding. Although a slight typographical error was made in the citation of the Minnesota rule alleged to be violated when the APO was issued, the title and substance of the proper rule was, in fact, accurately set forth in the June 2002 APO. In addition, the federal requirements that were incorporated in the Minnesota rule were properly referenced in the APO. The typographical error was brought to the attention of counsel for OSI two weeks prior to the commencement of the hearing. Under the circumstances, OSI cannot properly claim that it did not receive proper notice of the rules that were alleged to have been violated or that it was harmed by the error in any way. The Administrative Law Judge finds that the notice provided here was adequate because the APO did, in fact, include a concise statement of facts describing the alleged violation and quote the language of the rules that were alleged to have been violated. A mere typographical error in the citation of the Minnesota rule does not invalidate the notice in such a situation. Accordingly, the Administrative Law Judge concludes that the MPCA provided proper notice of the basis for the imposition of the APO under Minn. Stat. §116.072.

In the present case, the MPCA contends that OSI violated Minn. Rule 7045.0371 when it transported hazardous waste from Minnesota to Indiana on a manifest that was not properly completed. In particular, the MPCA argues that OSI's transportation of hazardous waste using a manifest that failed to list the generator's EPA identification number violated Minn. R. 7045.0371. The MPCA points out that that rule requires that hazardous waste be transported in accordance with "the Code of Federal Regulations, title 49, parts 171 to 179, as amended." 49 C.F.R. § 172.205(a) specifies that "[n]o person may offer, transport, transfer, or deliver a hazardous waste" unless a federal hazardous waste manifest form (EPA Form 8700-22 and, if continuation sheets are necessary, EPA Form 8700-22A) is prepared in accordance with 40 C.F.R. 262.20. 40 C.F.R. 262.20(a) requires that generators who offer hazardous waste for transportation for offsite treatment, storage, or disposal must prepare a specified manifest form "according to the instructions included in the Appendix to part 262." The instructions contained in the Appendix, in turn, require inclusion of the generator's EPA identification number on the manifest. Although one must follow a rather lengthy trail of state and federal regulations to reach the conclusion urged by the MPCA, the Administrative Law Judge, upon review of these rules, agrees that the MPCA is accurate in stating that manifests in Minnesota must include the generator's EPA identification number in accordance with the instructions set forth in the Appendix to 40 C.F.R. Part 262.

OSI asserts that it used an Indiana manifest for the shipment in accordance with Minn. R. 7045.0261, subp. 1(C). That rule states that, "[f]or shipments from Minnesota to a facility located in a state (consignment state) that requires the use of a manifest which is specific for that state, the generator shall use that manifest." OSI further contends that, in accordance with Indiana and federal law recognizing an exemption for CESQGs, Cy-Con was exempt from regulations requiring generators to obtain an EPA ID number. OSI asserts that the MPCA should not be able to penalize OSI for following a straightforward interpretation of Minn. R. 7045.0261, and argues that it followed both the letter and spirit of the MPCA regulations when it completed the manifest in accordance with the information that was given to it by the Indiana facility accepting the hazardous wastes. Although the MPCA concedes that OSI properly obtained an Indiana Uniform Hazardous Waste manifest form for use in transporting the hazardous

waste from Cy-Con in Minnesota to MEI-IN in Indiana, it argues that, to comply with Minnesota requirements, the generator's EPA identification number must be included on the manifest.

The Administrative Law Judge is not persuaded by OSI's argument. As a transporter of hazardous waste in Minnesota, OSI is responsible for complying with Minnesota regulations that govern hazardous waste transportation when hazardous waste transport either originates or terminates in Minnesota.^[46] Minn. R. 7045.0261 simply requires that the out-of-state manifest, if it is specific for that state, be used as the base document for the transportation of hazardous waste to that state. The Minnesota hazardous waste rules do not recognize an exemption to the manifest requirement for those with CESQG status or for shipments made on an out-of-state manifest. Because the hazardous waste at issue was transported in part within the State of Minnesota, the generator's EPA ID number was required to be included on the manifest under Minn. R. 7045.0371 and the incorporated federal rules cited above, regardless of the final destination of the waste. Thus, while OSI correctly obtained an Indiana manifest form in order to comply with Minn. R. 7045.0261, it should then have ensured that the manifest was completed properly by including the generator's EPA identification number in accordance with Minn. R. 7045.0371. These two rule provisions are not in conflict and thus both should be given effect.^[47] In addition, it must be noted that use of the Indiana manifest form is not at all at odds with use of the federal manifest form. In fact, the Indiana manifest form, while imprinted at the top with the seal of the State of Indiana and the address of the Indiana Department of Environmental Management, bears a notation at the bottom demonstrating that it is, in fact, EPA Form 8700-22.^[48]

Based upon the evidence adduced at the hearing, it is also clear that, even if a CESQG exemption were recognized in Minnesota, the quantity of waste that OSI transported from Cy-Con to MEI-IN did not qualify for CESQG status. Under the federal rules, a generator has CESQG status if it generates 100 kilograms of hazardous waste or less per month (i.e., 220 lbs. or less per month).^[49] To claim the CESQG exemption in Indiana, OSI would have had to transport 220 pounds or less in the 7-barrel, 365-gallon total shipment to MEI-IN. Although it is not possible to reconstruct the precise weight of the shipment without the material safety data sheets to calculate the specific gravity of some of the materials that were transported because the manifest description of those products was too vague, the MPCA established by a preponderance of the evidence (based upon two of the items transported) that the waste transported by OSI far exceeded this allowable weight. Any argument that the shipment weighed less than 220 pounds would require that each gallon transported by OSI weighed less than 1.6 pounds which, as demonstrated by the MPCA, is simply not possible given the description of the items shipped.

OSI contends that it, as the transporter, is entitled to rely on the facility in the receiving state for information on whether small quantity generators can ship hazardous wastes without an EPA ID number. OSI agrees that it could not accept shipment without an EPA ID number if it knew that more than 1,000 kilograms of materials were being shipped. However, OSI contends that it was justified in relying on the law of another state that Cy-Con qualified as a small quantity generator shipping an

acceptable quantity of wastes, since, under Minn. R. 7045.0261, the transporter must ship the hazardous state's wastes in accordance with the receiving state's regulations. The Administrative Law Judge concludes that OSI cannot properly claim that MPCA is estopped from citing the violation. To demonstrate equitable estoppel against the State, OSI would have to show that Minnesota officials made a misrepresentation of a material fact knowing that it was false and intending that it be acted upon, and that OSI did not know the facts and relied upon the State's misrepresentations to its detriment.^[50] In this instance, OSI failed to seek the advice of the regulatory authorities in either Minnesota or Indiana, and cannot show any affirmative misconduct on the part of either state. Its claim that it relied upon the advice of the Indiana facility that received the shipment is not a sufficient basis to estop the State of Minnesota from issuing the APO, nor does it justify a failure to abide by laws and rules relating to the transportation of hazardous waste in Minnesota.^[51]

OSI also argues that Indiana follows the federal regulations referenced in Minn. R. 7045.0371 and that these regulations served as the basis for OSI's determination that a small quantity generator who is not storing an unacceptable quantity of waste materials does not need an EPA ID number. OSI contends that the MPCA should not be permitted to penalize transporters for engaging in activities that comply with one section of the federal regulations but allegedly violate another. This argument overlooks the fact that the federal regulation setting forth the CESQG exemption (40 C.F.R. 261.5) is not among those incorporated in Minn. R. 7045.0371, nor is that rule mentioned in any of the federal provisions that are, in fact, incorporated. The Minnesota hazardous waste rules do not otherwise recognize a CESQG exemption. Since the shipment at issue originated in Minnesota, OSI was responsible for complying with Minnesota rules under Minn. R. 7045.0351.

As noted in the Findings of Fact, the MPCA calculated the base penalty for OSI's violation to be \$500. The MPCA enhanced this amount by 40 percent based upon its determination that the violation was willful and by 60 percent based upon OSI's history of past violations. The MPCA issued a nonforgivable APO to OSI based on its determination that the violation was serious and repeated in nature. The total penalty assessed by the MPCA against OSI was \$1,000.

The MPCA contends that the amount of the penalty was reasonable because it was based upon the standards set forth in the statute. The MPCA claims the violation was serious because the EPA identification number is a core requirement of the hazardous waste program that is used to track the generation and shipment of hazardous waste in Minnesota from cradle to grave. The MPCA claims that the violation was repeated because OSI has violated "the manifesting requirements on at least two prior occasions, resulting in a 1994 Stipulation Agreement with the MPCA and the issuance of an Administrative Penalty Order in 2000."^[52] OSI points out that the alleged conduct has been corrected because Cy-Con has obtained an EPA number and submitted a revised manifest, and argues that the penalty therefore must be forgiven because the violation was not serious or repetitive. OSI also contends that the violation was not willful, OSI did not gain economic benefit from the transaction, and there was no potential for damage. Accordingly, OSI claims that the violation and penalty assessed against OSI should be rejected.

The Administrative Law Judge concludes that the \$500 base penalty assessed against OSI by the MPCA was based upon an appropriate consideration of the factors set forth in Minn. Stat. § 116.072, subd. 2(b), and is reasonable. The Administrative Law Judge agrees that the potential for harm in this instance should be viewed as “minor” and that the deviation from compliance should be viewed as “major” in light of the importance of the generator identification number in the tracking of hazardous waste shipments. However, the MPCA failed to establish that the violation was willful or that OSI has committed repeated violations of similar rules in the past. OSI presented convincing evidence that it complied with the Minnesota rule requiring use of an Indiana manifest and acted in good faith with respect to this shipment, and thus did not willfully violate this requirement or act with careless disregard of its obligations.^[53] In reaching this conclusion, it is significant that the requirement for inclusion of an EPA identification number is not expressed in clear, mandatory language in the Minnesota rules and is only discernable in the federal rules after reviewing several rules and the instructions for completing the manifest form. Moreover, OSI’s past violations in 1994 and 2000 apparently involved allegations of transporting waste without any permit, license, or manifest whatsoever, not situations like this in which an incomplete manifest was used. There was no persuasive showing that any of these violations were similar to the present violation and no discussion of the basis on which a 60% enhancement was ordered. In addition, a significant amount of time has elapsed since 1994, the only other occasion on which OSI was cited for a violation of Minn. R. 7045.0371.

Under the circumstances, the Administrative Law Judge believes the MPCA’s upward adjustments for willfulness and repeated violations are not reasonable and recommends that the amount of the penalty stand at \$500, without enhancements for willfulness or repeated violations. Because the MPCA showed that the violation was serious, it is not unreasonable that the MPCA determined that the penalty would be nonforgivable even though corrective action has been taken.

Accordingly, the ALJ recommends that the Commissioner affirm the APO but reduce the non-forgivable penalty assessed against OSI from \$1,000 to \$500.

B.L.N.

^[1] Joint Ex. 1 at ¶ 1. Joint Ex. 1 is a Joint Stipulation of Facts entered into by the parties.

^[2] Testimony of Rosier.

^[3] Testimony of Henderson; Minn. R. 7045.0371 (relying upon 49 C.F.R. § 172.205(a), which references 40 C.F.R. § 262.20(a) which, in turn, references the manifest form and instructions contained in the Appendix to 40 C.F.R. part 262.

^[4] Joint Ex. 1 at ¶ 2, Exs. A-B; Ex. 2 at ¶¶ 2-3, Exs. A-B.

^[5] Joint Ex. 1 at ¶ 3, Ex. C.

^[6] Ex. 2 at ¶ 4.

^[7] Ex. 2 at ¶ 5; Ex. J attached to Joint Ex. 1.

^[8] See Ex. J attached to Joint Ex. 1; Testimony of Rosier.

^[9] Testimony of Rosier.

^[10] Joint Ex. 1 at ¶ 4, Ex. D; Testimony of Henderson.

^[11] See Ex. I attached to Joint Ex. 1.

[12] Joint Ex. 1 at ¶ 5, Ex. E; Testimony of Henderson, Rosier.
[13] Joint Ex. 1 at ¶ 6.
[14] Id. at ¶ 7, Ex. F; Testimony of Henderson.
[15] Testimony of Henderson, Fox; Minn. R. 7045.0206.
[16] There was some indication that OSI's bid was based upon providing 85-gallon overpack drums to transport damaged 55 gallon drums (see Ex. B attached to Joint Ex. 1). The manifest itself (Ex. E attached to Joint Ex. 1) lists a total quantity of 85 gallons of "hazardous waste (asphalt emulsion) liquid, n.o.s., lead" but also indicated in the area containing additional description of the materials that this item was one 85-gallon overpack. Because there is some ambiguity, the Administrative Law Judge finds that the amount shipped was in the range of 55 to 85 gallons.
[17] Testimony of Henderson.
[18] *Id.*
[19] Joint Ex. 1 at ¶ 8, Ex. G; Testimony of Henderson.
[20] Joint Ex. 1 at ¶ 9, Ex. H; Testimony of Henderson, Rosier.
[21] Testimony of Henderson.
[22] Joint Ex. 1 at ¶ 10, Ex. I; Testimony of Henderson.
[23] Joint Ex. 1 at ¶ 11, Ex. J; Testimony of Henderson, Rosier.
[24] Testimony of Henderson.
[25] Joint Ex. 1 at ¶ 12, Ex. K; Testimony of Henderson. Although EPA identification numbers used to be issued by the EPA, they are now issued by the State of Minnesota. In emergency situations, the State of Minnesota can issue an EPA identification number in one day. Testimony of Henderson.
[26] Joint Ex. 1 at ¶ 13; Ex. 5; Testimony of Henderson, Fox.
[27] Testimony of Henderson.
[28] *Id.*
[29] Joint Ex. 1 at ¶ 14; Testimony of Henderson. ;
[30] Testimony of Henderson; Ex. 3.
[31] Joint Ex. 1 at ¶ 15, Ex. L.
[32] Joint Ex. 1 at ¶ 15, Ex. L.
[33] Exs. 3, 4; Testimony of Henderson.
[34] Ex. 3 at 3-4; Ex. 4 at 3; Testimony of Henderson.
[35] Ex. 3; Testimony of Henderson.
[36] Ex. 3; Testimony of Henderson.
[37] Joint Ex. 1 at ¶ 16, Ex. M.
[38] Joint Ex. 1 at ¶ 17, Ex. N.
[39] See Letter of April 22, 2003, to the Administrative Law Judge from Carmen Chittick Dierking.
[40] Notice of Hearing at 1; Stipulation of Parties at Hearing.
[41] Joint Ex. 1, Ex. L; Testimony of Henderson.

[42] Testimony of Rosier.
[43] *Id.*
[44] Testimony of Henderson.
[45] Minn. Stat. § 116.072, subd. 6(c).
[46] See Minn. R. 7045.0351.
[47] It is well established that even where two provisions seem to be in conflict, they should be construed where possible to give effect to both. See Minn. Stat. § 645.26 and *Lee v. Hunt*, 642 N.W.2d 57 (Minn. App. 2002). In addition, Minn. R. 7045.0070 specifies that, in the event Chapter 7045 conflicts with obligations or duties imposed by any other laws, statutes, rules, standards, or ordinances of the federal, state, or local governments or agencies, "the more stringent shall apply." The more stringent requirement here would be inclusion of the EPA identification number on the manifest.
[48] See Joint Ex. 1, Ex. E.
[49] The CESQG category is comparable to Minnesota's Very Small Quantity Generator (VSQG) status as defined in Minn. R. 7045.0206, subp. 4, which encompasses generators who generate 100 kilograms of

hazardous waste or less in a calendar month. VSQGs in Minnesota are not, however, exempted from compliance with the hazardous waste rules.

^[50] See, e.g., *REM-Canby, Inc. v. Minnesota Department of Human Services*, 494 N.W.2d 71, 74 (Minn. Ct. App. 1992), rev. denied (Minn. 1993).

^[51] The MPCA did, however, take OSI's claimed reliance on MEI-IN's advice into consideration as a mitigating factor when determining OSI's base penalty.

^[52] MPCA's Reply Brief at 8.

^[53] The term "willful" is not defined in Minn. Stat. § 116.072, subd. 2. In an earlier case involving an APO issued by the MPCA, Administrative Law Judge Bruce Campbell construed the term to encompass situations in which a facility acted in disregard of the requirements of the MPCA's hazardous waste rules. *In the Matter of the Administrative Penalty Order issued to Palm Industries, Inc.*, OAH Docket No. 2-2200-5080-2 at 15 (1990).